		Case 4:08-cv-01376-CW Document 64	Filed 03/27/20	008 Page 1 of 12		
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IWICK & WEST I ATTORNEYS AT LAW MOUNTAIN VIEW	14	UNITED STATES DISTRICT COURT				
FENW A1	15	NORTHERN DISTRICT OF CALIFORNIA				
	16 17	OAKLAND DIVISION				
	18	SUCCESSFACTORS, INC., a Delaware	Case No. CV 08	1376 CW		
	19	corporation,		OBJECTIONS TO		
	20	Plaintiff,		N OF DAVID WATKINS		
	21	V.	Date: Time:	March 27, 2008 2:00 p.m.		
	22	SOFTSCAPE, INC., a Delaware corporation; and DOES 1-10, inclusive,	Courtroom: Judge:	Hon. Claudia Wilken		
	23	Defendants.	Date of Filing: Trial Date:	March 11, 2008 No date set		
	24		•			
	25	Pursuant to Civil Local Rule 7-5, Plaintiff SuccessFactors, Inc. ("SuccessFactors," or				
	26	"Plaintiff") hereby objects to the untimely Declaration of David Watkins, submitted by Defendant				
	27	Softscape, Inc. ("Softscape," or Defendant")	••	•		
	28	Plaintiff requests that the Court disregard the	declaration for the	reasons set forth herein.		

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I. THE WATKINS DECLARATION SHOULD BE EXCLUDED IN ITS ENTIRETY

Defendant Softscape, Inc. ("Softscape") filed an additional declaration in opposition to Plaintiff's motion for a preliminary injunction on March 26, 2008, after the close of business. nine days after the deadline imposed by this Court, and on the eve of hearing on the motion. It should be stricken in its entirety, and should not be considered in ruling on Plaintiff's motion. See, e.g., Conwest Res., Inc. v. Playtime Novelties, Inc., 84 U.S.P.Q.2d (BNA) 1019 (N.D. Cal. 2006) (refusing to consider late-filed declarations submitted by defendant in ruling on motion for preliminary injunction); Helguero v. City of Costa Mesa, No. 97-55686, 1998 U.S. App. LEXIS 1689, at *8-*9 (9th Cir. Feb. 3, 1998) (unpublished opinion) (district court properly refused to consider late-filed declarations filed in support of preliminary injunction); Hansen Bev. Co. v. Nat'l Bev. Corp., Case No. 06-5470-ER, 2006 U.S. Dist. LEXIS 96472 (C.D. Cal. Oct. 5, 2006) (in entering preliminary injunction, refusing to consider "any last minute offer of proof" consisting of information available to defendants at the time they filed their original response; "Defendants are, of course, free to raise these issues at the trial on the merits to determine whether a permanent injunction should issue"), rev'd on other grounds, 493 F.3d 1074 (9th Cir. 2007), vacated as moot, 499 F.3d 923 (9th Cir. 2007).

Under the circumstances, consideration of Defendant's late-filed declaration would be manifestly prejudicial to Plaintiff because it purports to state facts related to a defense that was never raised in Defendant's opposition—namely, the purported truth of some the statements contained in the Presentation. See Watkins Decl. ¶¶ 5-6. Plaintiff has never had the opportunity to respond, either legally or factually, to the contentions made by Mr. Watkins in his declaration. See Hansen Bev., 2006 U.S. Dist. LEXIS 96472 (C.D. Cal. Oct. 5, 2006) (refusing to consider late-filed declarations in opposition to preliminary injunction in part because "other side had no opportunity to respond").

¹ See also, e.g., Carson Harbor Village, Ltd. v. County of L.A., 433 F.3d 1260, 1263 n.3 (9th Cir. 2006) (district court properly excluded declarations filed in submitted on the day of hearing on motion for summary judgment and affirming summary judgment); Woodfin Suite Hotels, LLC v. City of Emeryville, C-07-1719-SBA, 2007 U.S. Dist. LEXIS 44079, at *10-*11 (N.D. Cal. June 7, 2007) (striking opposition to motion to dismiss filed six days late and granting motion to dismiss).

In fact, Defendant's Opposition papers expressly acknowledged that Defendant was not challenging falsity for the purposes of deciding the preliminary injunction. As stated in its Response,

[a]lthough SuccessFactors spends considerable effort trying to demonstrate that the Presentation is false, and that Softscape believed the information to be accurate, that issue is irrelevant for purposes of determining whether a preliminary injunction should issue.

Response at 12:19-21 (emphasis added). Relying on that statement, Plaintiff presented no further argument on the issue of truth or falsity. And, of course, by submitting an entirely new argument after Plaintiff's reply, Defendant has deprived Plaintiff of its right to notice and an opportunity to present a reply to these new matters. It is hard to imagine a more compelling circumstance of prejudice than to permit a litigant to raise the night before the hearing issues that it had earlier unequivocally disclaimed.

Furthermore, Defendant offers no good explanation for its prolonged delay in presenting this declaration to the Court. Its testimony was readily available to Defendant at all times, and Defendant does not make any suggestion to the contrary. Instead, Mr. Watkins complains only that his time is "limited," and that the schedule set forth by the Court did not allow him to complete his declaration in anything approaching a timely fashion. *See* Watkins Decl. ¶ 3. The repercussions of Defendant's failure to honor the Court's scheduling order are appropriately borne by Defendant, not Plaintiff.²

Finally, Local Rule 7-3 provides that "once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval." Defendant neither sought nor obtained Court approval, or a stipulation, for its filing, rendering it improper under the Local Rules.

² Defendant fashions the declaration in part as in opposition to Plaintiff's objections to the timely-filed declarations submitted by Defendant's General Counsel, Susan Mohr. Watkins Decl. ¶ 3. This gambit fails as well. A party has no right to file untimely declarations to supplement earlier-filed declarations that are deficient. *See., e.g., Carson Harbor Village*, 433 F.3d at 1263 n.3 (district court properly excluded untimely-filed declarations submitted to fill holes in earlier declarations). Nor would any need to reinforce Ms. Mohr's declaration possibly entitle Defendant to raise a completely new issue waived in its Opposition papers.

defendant's untimely declaration is replete with inadmissible evidence³

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3		Defendant's Inadmissible Evidence	Bases for Objection
4	1.	Watkins Decl. ¶ 4	Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801. The paragraphs
5		" As discussed below, I believe that each	purporting to substantiate the truth of the
6		statement in that Presentation that is claimed to be false by Mr. Bernshteyn in	statements are largely based on inadmissible hearsay from unidentified Softscape customers,
7		his March 11, 2008 declaration is, in fact, true."	or are otherwise inadmissible. J.K. Harris & Co. v. Kassel, 253 F. Supp. 2d 1120, 1129-30
8		ituc.	& nn.7-8 (enjoining statements declared false
9			by plaintiff and rebutted only by inadmissible evidence of what third parties had said to
10			Defendant as purported support for the truth of the statements).
11			the statements).
12			
13	2.	Watkins Decl. ¶ 5	Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801; <i>J.K. Harris</i> 253 F.
14		" Other sources of information include information I and other Softscape	Supp. 2d at 1129-30 & nn.7-8; <i>Allen v. IT&T</i> ,
15		employees received from current and	164 F.R.D. 489, 492 (D. Ariz. 1995) ("[I]t is not enough that an affiant <i>assert</i> that he or she
16		former SuccessFactors customers, some of whom have switched to using Softscape's	has personal knowledge of the facts recited; the facts themselves must show that they are
17		software products and others who have engaged us as a potential vendor. For	matters known to the affiant personally and are
18		business reasons, at this stage of the	not based upon hearsay or upon 'information and belief.'"), <i>aff'd</i> , 1997 U.S App. LEXIS
19		proceedings I am not at liberty to reveal the name and identity of these sources of	6693 (9th Cir. 1997).
20		information. In my professional judgment and experience, however, I believe the	
		information I received from those	
21		customers is truthful and accurate."	

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FENWICK & WEST LLP Attorneys at Law Mountain View

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³ Because of the untimeliness of the Watkins Declaration, Plaintiff reserves its right to make further objections to any of the statements contained therein as appropriate through the duration of this action.

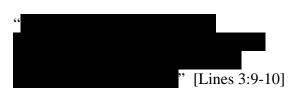
3. Watkins Declaration ¶ 6(a)

• "Slides 9-12 in the Presentation are based on the information I received

Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801; *J.K. Harris* 253 F. Supp. 2d at 1129-30 & nn.7-8.

Objections – Relevance. Misleading. Fed. R. Evid. 401-03. The false or misleading statement in the Presentation is the statement that the entire Presentation is a compilation of facts from customers. Declarant's statement that four slides (out of 43) are purportedly based on information received from customers is misleading and irrelevant.

4. Watkins Declaration ¶ 6(a)



Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801; *Allen v. IT&T*, 164 F.R.D. at 492 (D. Ariz. 1995). Declarant sets forth no facts to support his statement that SuccessFactors lacks corporate integrity.

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5. Watkins Decl. ¶¶ 6(b)-6(c), 6(f)

Attesting to declarant's "belief" in the truth of various statements, but not as to facts within his personal knowledge substantiating the truth.

Objections - Relevance. Misleading, Lack of Foundation. Fed. R. Evid. 401-03, 602. The false and misleading statements in the Presentation at issue are (a) regarding SuccessFactors' customer retention rate and (b) that SuccessFactors' customers listed on the website have left SuccessFactors as a result of dissatisfaction. Declarant's statements confirm that that the methodology Defendant used in creating the Presentation assumed (incorrectly) that any customer no longer listed on SuccessFactors' website was no longer a customer and was dissatisfied. Nothing in declaration supports the truth of this assumption, a basis for personal knowledge supporting this assumption, or the false and misleading statements derived from this methodology.

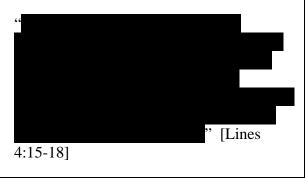
6. Watkins Declaration ¶ 6(d)

"I have direct knowledge that the Presentation that

" [Lines 4:11-12]

Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801; *J.K. Harris* 253 F. Supp. 2d at 1129-30 & nn.7-8; *Allen v. IT&T*, 164 F.R.D. at 492 (D. Ariz. 1995). The declarant does not substantiate anything he saw, did, said, heard or otherwise perceived creating his supposed "direct knowledge."

7. Watkins Declaration \P 6(e)



Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801; *J.K. Harris* 253 F. Supp. 2d at 1129-30 & nn.7-8; *Allen v. IT&T*, 164 F.R.D. at 492 (D. Ariz. 1995).

8. Watkins Declaration $\P 6(f)^4$



Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801; *J.K. Harris* 253 F. Supp. 2d at 1129-30 & nn.7-8; *Allen v. IT&T*, 164 F.R.D. at 492 (D. Ariz. 1995).

⁴ See also Objection 5, supra.

Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801.

Objections - Relevance. Misleading. Fed. R. Evid. 401-03. Declarant does not dispute the ultimate fact that SuccessFactors employs far less than the 440 consultants claimed in the Presentation. Declarant simply sets forth a flawed methodology for calculating his number used in the presentation. Nothing in declaration supports the truth of the false and misleading statements derived from this flawed methodology.

Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801; Allen v. IT&T, 164

F.R.D. at 492 (D. Ariz. 1995).

Objections - Relevance. Misleading. Fed. R. Evid. 401-03. The Presentation falsely and misleadingly asserts that SuccessFactors' database structure creates a security risk. Declarant's does not address this point.

"In my experience, I believe the number is substantially lower than 95%"

Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801; Allen v. IT&T, 164 F.R.D. at 492 (D. Ariz. 1995).

" [Lines 5:26-27]

Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801; J.K. Harris 253 F. Supp. 2d at 1129-30 & nn.7-8; *Allen v. IT&T*, 164 F.R.D. at 492 (D. Ariz. 1995).

Attesting to various information "I believe

Objections – Inadequate Foundation; Hearsay. Fed. R. Evid. 602, 801; J.K. Harris 253 F.

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	2	to be true of my personal knowledge" without explanation for source or basis for	Supp. 2d at 1129-30 & nn.7-8.	
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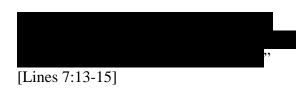
14. Watkins Declaration ¶ 8

"I have personal knowledge the Presentation was intended for Softscape's internal use only. It was so marked and saved electronically on the company's server, and this treatment was repeatedly emphasized to the Softscape sales force both orally and in writing." [Lines 6:22-25] Objections – Inadequate Foundation; Best Evidence Rule, Defendant fails to attach an electronic or paper copy reflecting any "for internal use only" marking, plus never includes any written statements to sales team before filing of lawsuit. Fed. R. Evid. 602, 1001.

15. Watkins Declaration ¶ 8

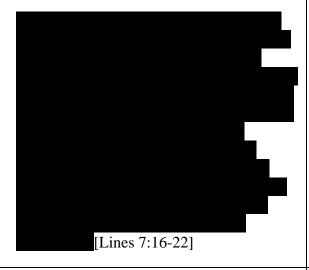
"No distribution of the Presentation outside the company was ever authorized by Softscape, and such distribution would be in direct contravention and violation of Softscape's employment and business policies." [Lines 6:25-28] Objections – Relevance. Fed. R. Evid. 401-03. It is irrelevant that Softscape allegedly did not authorize the distribution of the Presentation. Softscape would still be liable for unauthorized distributions under the doctrine of *respondeat superior*.

16. Watkins Declaration ¶ **10**(c)



Objection – Hearsay (double). Fed. R. Evid. 801.

17. Watkins Declaration ¶ 10(d)



Objections – Lacks foundation. Fed. R. Evid. 602.

18. Watkins Declaration \P 10(f)

"I believe that Softscape has to date taken all the steps it can reasonably take to Objections – Lacks foundation. Fed. R. Evid. 602.

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	1	identify the person(s) and the methods they		
	2	used to disseminate the Presentation in violation of Softscape's policies.		
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